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Remember 9/11/01: Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"I think part of a best friend's job should be to immediately clear your computer history if you die." (Author unknown)

IN THIS ISSUE:

Page:

Administrative Notes:

Camreta v. Greene; Much Ado About Nothing 1
Firearms and W&I § 5150 Subjects (Continued) 2

Case Law:

Residential Entries 3
Miranda; Minimizing the Importance of the Admonishment 5
Interrogation Tactics and Voluntariness 5
Detentions 8
Miranda; Custody and the Public Safety Exception 8
Consent to Search 8
Curtilage in a Campground 8

ADMINISTRATIVE NOTES:

Camreta v. Greene; *Much Ado About Nothing*: In *Greene v. Camreta* (9th Cir. 2009) 588 F.3rd 1011, the Ninth Circuit Court of Appeal held that taking a minor, suspected of being a child molest victim, out of her school class and interviewing her without a court order, parental permission, or exigent circumstances, is an illegal seizure and a Fourth Amendment violation. The United States Supreme

Court, in *Camreta v. Greene* (May 26, 2011) __ U.S. __ [179 L. Ed.2nd 1118], the case we all hoped would overrule this stupid decision and provide us with some useful guidance, decided not to decide the issue. Instead, they expended 37 pages to tell us that the issue is moot; the “victim” child being now almost 18 years old, living in another state, and no longer subject to being yanked out of class and interviewed by the police. But the good news is that the Court did in fact overturn the 9th Circuit ruling, leaving us with no legal authority to the effect that taking a child out of class to interview him or her without a court order, parental permission, or an exigency, is a Fourth Amendment violation. But the bad news is that there is also no case law saying that the 9th Circuit was wrong, leaving that Court free to renew this ridiculous rule should you choose to interview a minor under circumstances the original *Camreta* case said you couldn’t. But note that P.C. § 11174.3(a) says that you can do exactly what *Camreta*, while it existed, said you couldn’t. *So what do you do?* I haven’t the faintest idea. I, personally, would love for you to follow P.C. § 11174.3(a) so that we can set up another test case and resolve the issue once and for all. But it’s not my house on the line. So check with your own department’s policies and/or do whatever you think is right.

Firearms and W&I § 5150 Subjects (Continued): In the last *Legal Update* (Vol. 16, #4, May 12, 2011), I commented on the need for a search warrant (absent consent or exigent circumstances) to search for firearms and other deadly weapons believed to be in a 5150 subject’s home. I also noted that “(t)he mere knowledge that a detained mental patient possesses dangerous weapons in his home does not likely provide, by itself, an exigent circumstance excusing the need for a search warrant.” This simple comment has spurned requests for further information concerning how far this rule goes. For instance, if the 5150 subject has passed his weapons onto others, what do we need to get into that third party’s home? *People v. Sweig* (2008) 167 Cal.App.4th 1145 (petition granted), which led to the enactment of P.C. § 1524(a)(10) (authorizing the use of warrants in such a case), and any number of other appellate court decisions from the U.S. Supreme Court on down, have made it abundantly clear that one’s privacy rights in his or her home outweigh law enforcement’s right to look for and seize such weapons without a court’s permission, absent consent or exigent circumstances. Given the high “*expectation of privacy*” in a person’s home (*People v. Ramey* (1976) 16 Cal.3rd 263.), entering a person’s home without a search warrant (or consent or an exigency) is illegal. Even if it is the intent of officers to do no more than secure a residence pending the obtaining of a search warrant, the entry itself, with or without a search, is a Fourth Amendment issue. (*United States v. Alaimalo* (9th Cir. 2002) 313 F.3rd 1188, 1192, fn. 1.) *Sweig* itself, and any number of other appellate court decisions (E.g., see *Huff v. City of Burbank* (9th Cir. Jan. 11, 2011) 632 F.3rd 539, as briefed in *Legal Update*, Vol. 16, #4), stand for the proposition that the mere knowledge alone that there are seizable weapons located in one’s home, absent an “*articulable reasonable belief*” that they are about to be secreted or that a clear and present danger exists to officers or others, entering a residence to search for those weapons, or even to secure the residence pending the obtaining of a search warrant, is illegal. (See also *Brigham City v. Stuart* (2006) 547 U.S.

398; *Michigan v. Fisher* (2009) 558 U.S. __ [130 S.Ct. 546].) You simply cannot assume an exigency just because a homeowner possesses a firearm or other deadly weapon that may be subject to seizure, absent some reason to believe that an occupant intends to either hide or use the gun. If you go to the house without a warrant, choosing to seek consent, and are denied, the fact that the occupants now know that you are coming for the gun isn't likely going to be enough to give you the exigency you need to force entry. So my advice to you is not to put yourself in the position where you need to choose between making an illegal entry or waiting outside, hoping no exigency will arise. Eliminate the issue and get a warrant before you go to the house.

CASE LAW:

Residential Entries:

***Kentucky v. King* (May 16, 2011) __ U.S. __ [179 L.Ed.2nd 865]**

Rule: A police officer knocking on the door of a residence and identifying himself does not itself constitute a violation or threatened violation of the United States Constitution, and therefore does not require the suppression of evidence should an exigency arise as a result.

Facts: Lexington, Kentucky, police officers conducted a controlled buy of crack cocaine. The control officer watched the buy go down from a nearby unmarked car. When the buy was complete, the control officer radioed uniformed police officers to move in and arrest the drug dealer who, at that moment, was moving quickly towards the breezeway of an apartment building. At the end of the breezeway were two apartments; one on the left and one on the right. The control officer radioed that the suspect was going into the apartment on the right, but the uniformed officers didn't hear him because they'd already left their patrol cars. As the uniformed officers entered the breezeway, they heard a door shut but didn't see which one. Smelling a "very strong odor" of marijuana emanating from the apartment on the left, the officers started banging on that door while loudly announcing their presence (i.e.: "*This is the police!*", or "*Police, police, police!*"). (Note that they did not demand entry.) As soon as they did this, they heard people moving around inside and other noises that sounded like things were being moved around. Suspecting that drug related evidence was being destroyed, the officers kicked in the door. Inside, marijuana and powder cocaine was observed in plain sight. A subsequent search (presumably via a search warrant or consent) resulted in the recovery of crack cocaine, cash, and drug paraphernalia. Defendant Hollis Deshaun King was one of the residents of the apartment. (The drug dealer the officers had been pursuing was later found in the apartment on the right.) Defendant's motion to suppress was denied, the trial court finding that the officers had probable cause to make entry into the apartment and exigent circumstances excusing the lack of a search warrant. Defendant pled guilty and appealed. A Kentucky appellate court upheld defendant's conviction, finding the entry to be lawful. But the Kentucky Supreme Court reversed. Questioning whether the sounds heard by the officers constituted sufficient exigent circumstances, it assumed for the sake of argument that it did. But it ruled that because the officers "impermissibly

created the exigency” by knocking on the door when they should have instead sought a search warrant first, the warrantless entry was made in violation of the Fourth Amendment. Because it was reasonably foreseeable that the occupants would have tried to destroy evidence upon the police knocking on their door, the officers created their own exigency. Per the Kentucky Supreme Court, you can’t do that. The United States Supreme Court granted certiorari.

Held: In a split (eight-to-one) decision, the United States Supreme Court reversed, remanding the case back to the Kentucky courts solely to determine whether the circumstances of this case did indeed constitute exigent circumstances. But assuming that exigent circumstances did exist, the Court found that the officers did not impermissibly create those exigent circumstances. The Court first noted that various state and federal courts have established a number of rules concerning officers creating their own exigency. Some courts, for instance, find it an issue of the officer’s “bad faith” by attempting to circumvent the warrant requirement when, with probable cause that would have allowed for a search warrant, they instead seek a consensual entry. When denied such entry, the officers then argue that they then have an exigency in that the occupants, knowing that the officers will shortly be back with a search warrant, will likely destroy any existing evidence. This theory, the Court held, violates the long-standing rule that an officer’s subjective intent is (with limited exceptions) irrelevant. Bad faith or not, simply knocking at one’s door and seeking a consensual entry is not unconstitutional in itself. Unless the officers do something in violation, or threatened violation, of the Constitution, seeking a consensual entry is proper. Other courts have held that where officers have pre-existing probable cause to seek a search warrant, they may not use other tactics when it is reasonably foreseeable that such tactics will create an exigency. This was the theory of the Kentucky Supreme Court. Again, however, the U.S. Supreme Court found that absent the officers’ tactics being a violation, or threatened violation, of the Constitution, there is nothing unlawful in using such a tactic. Further, there is no requirement that police officers halt an investigation upon obtaining probable cause. It is always permissible to continue to seek further evidence. Lastly, some courts apply a standard of “good investigative tactics.” The Court found this test too vague to be enforceable. In the instant case, the officers did nothing more than knock on the door and announce their presence. There is nothing unlawful in doing this. There was no evidence that they were threatening to make an unlawful entry. The fact that they knocked “loudly,” or that they “banged” on the door, is irrelevant. Had they not done so, they would have been subject to criticism for not having done enough to notify the occupants of their presence. The fact that the occupants, upon hearing the officers and their knocking, chose to attempt to destroy evidence, is their problem. No one forced them to do that. So assuming that the noises the officers heard from inside did in fact constitute exigent circumstances, the immediate warrantless entry was lawful.

Note:An important fact to note is that the officers did not demand entry. Had they done so, then the Court would have had to determine whether, under the circumstances, they had a right to enforce that demand. For instance, were they in fresh pursuit of a fleeing felon that would have justified an immediate entry? But because no such demand was made, that issue was never brought up. And note that this case, by implication, probably

reverses a number of California and Ninth Circuit cases on the issue. (E.g., see *People v. Shuey* (1973) 13 Cal.App.3rd 835; and *United States v. Driver* (9th Cir. 1985) 776 F.2nd 807.) You may now seek a consensual entry of a residence even if you already have probable cause, but decided for whatever reason not to seek a search warrant first. *But* (and this is a big “*butt*”), this case does not mean that just because the occupants now know you’re coming that it is reasonable to believe that they will necessarily destroy evidence pending the obtaining of a search warrant. The *King* case specifically *does not* decide what is, and what is not, exigent circumstances allowing for an immediate entry. I would think you will have to be able to articulate specific facts applicable to your present situation that reasonably led you to believe that evidence will likely be destroyed or secreted absent an immediate entry to secure the house pending the obtaining of a search warrant. (See Administrative Note, above.) Lastly, note that this decision does not seek to eliminate the requirement that you demand entry as a part of your knock and notice obligations under P.C. §§ 844 and 1531. That’s a whole different issue.

***Miranda; Minimizing the Importance of the Admonishment:
Interrogation Tactics and Voluntariness:***

Doody v. Ryan (9th Cir. May 4, 2011) __ F.3rd __ [2011 U.S.App. LEXIS 9102]

Rule: (1) Minimizing the importance of the *Miranda* admonishment, while inferring that it is intended only for the guilty, is improper. (1) Lengthy and intense interrogation tactics with a young, criminally unsophisticated suspect, is a violation of the subject’s “due process” rights when his will to resist is overborne.

Facts: Johnathan Andrew Doody was but 17 years old, foreign born, and criminally unsophisticated. It was alleged that defendant and at least one other person, Alessandro Garcia, broke into a Thai Buddhist temple and summarily executed nine people—monks and other residents—by arranging them into a tidy little circle and shooting each of them in the head. Robbery was the motive; the victims’ living quarters being ransacked and property taken. Mass murder was the means of insuring there were no witnesses. Defendant and Garcia became suspects when a .22 caliber Marlin model 60 rifle was found by a security guard in the vehicle of one Rolando Caratachea several weeks after the murders. Just such a weapon, already identified as the type of rifle used in this horrendous crime, was being sought by investigators. It was quickly determined through ballistics that Caratacheas’s rifle was in fact the Marlin rifle that had been used to kill at least some of the victims. Caratachea told detectives that he’d loaned his rifle to defendant and Garcia around the time of the murders. Defendant was therefore contacted at his high school and voluntarily brought to the police station for questioning. Defendant’s interview was initially begun with two investigators. He was first asked if he had ever heard of the *Miranda* warnings, to which he responded that he had not. So, while using an admonishment form for guidance, the detectives provided defendant with an ad-libbed explanation that took up twelve pages of transcript. Included in this discussion was an admonishment that the *Miranda* warnings were “*not meant to scare you*” and that he shouldn’t “*take it out of context.*” He was also told by one of the detectives: “*I don’t want you to feel that because I’m reading this to you that we*

necessarily feel that you're responsible for anything. It's for your benefit. It's for your protection and for ours as well." While still reading defendant his rights, one of the investigators decided to elaborate as well on his right to an attorney, telling him that a lawyer will "help you concerning the crime or any kind of offense that we might think that you or somebody else is involved in, if you were involved in it, okay. Again, it [does] not necessarily mean that you are involved, but if you were, then that's what that would apply to, okay?" Defendant told the investigators that he understood his rights and agreed to speak with them, and that he didn't need an attorney to be present. What followed was a 12½ hour interrogation lasting all night. Defendant initially, and repeatedly, denied being involved in the murders. But the more he denied, the harder the investigators pushed, lecturing him on his duty to answer questions, the need to tell the truth, and repeated exhortations to cooperate. Accusing defendant of lying, they told him that "you have to tell us. You have to." Under this pressure, Defendant eventually admitted to borrowing Caratachea's rifle but claimed that he had returned it before the murders. Eventually a third investigator, and at times a fourth, joined them in the interrogation. He was "barrage(d)" with questions. Defendant soon quit answering altogether, sitting in silence, often staring at the floor, as the same questions were asked over and over. More than six hours into the interrogation, Defendant finally responded with a "yes" when asked again if he'd been involved. He then remained silent again for the next half hour as more questions were asked. Finally, after another thirty minutes of continuous questions, defendant started talking about the murders in a narration, saying that he, Caratachea, Garcia, and another person named George, did the murders. The interrogation, that had begun at 9:25 p.m. the evening before, finally ended at 10:00 a.m. with a broken, sobbing defendant. He was later charged as an adult, along with Garcia, with nine counts of murder and related crimes. Garcia pled guilty and testified against him. Defendant was convicted on all counts and appealed. His conviction was upheld through Arizona's appellate court system. He filed a petition for a writ of habeas corpus in federal court, which was also denied. He appealed to the Ninth Circuit Court of Appeal which, en banc (i.e., with eleven justices), reversed. The United States Supreme Court later granted certiorari, vacated the Ninth Circuit's opinion, and remanded with instructions to reconsider their decision in light of *Florida v. Powell* (2010) 130 S.Ct. 1195.) (*Florida v. Powell* was the Supreme Court decision where it was held that telling an in-custody suspect that he has "the right to talk to a lawyer before answering any of our questions" and then; " [y]ou have the right to use any of these rights at any time you want during this interview," although maybe not the "clearest possible formulation" of the suspect's rights, was legally sufficient.) Defendant, in his appeal, argued that the admonishment given him was too far from being the "clearest possible formulation" of his rights to be lawful. He further argued that even if the admonishment given to him was lawful under *Powell*, his eventual confession was not voluntary under the Fifth and Fourteenth Amendment "due process" clauses, and should have been suppressed.

Held: On remand from the U.S. Supreme Court, the Ninth Circuit Court of Appeal (again en banc), in a split 8-to-3 decision, reaffirmed its previous holding by again reversing defendant's conviction. Of the eleven justices on the panel, seven found defendant's confession to be involuntary; eight justices ruled that the *Powell* decision did nothing to change their minds about the inadequacy of the *Miranda* admonishment as

provided to defendant. (1) *The Waiver*: In discussing whether Defendant had been adequately advised of his *Miranda* rights, the Court first noted the purposes behind the requirement that an in-custody suspect be advised of his rights. The primary objective of *Miranda* is “to reduce the risk of a coerced confession and to implement the Self Incrimination Clause.” To accomplish this, “the accused must be adequately and effectively apprised of his rights.” However, when a police interrogator words a *Miranda* admonishment, or supplements it in such a way, that its importance is minimized or trivialized, then the Supreme Court’s goals in establishing the *Miranda* rule are not met. In this case, Defendant was purposely led to believe that reading him his rights was not much more than a mere formality; something they are required to do whether or not he did anything wrong, and something that shouldn’t be “taken out of context.” The officers also told defendant that the reading of the rights under *Miranda* was something that was both for his benefit as well as the benefit of the officers; an incorrect statement of the law. Lastly, and perhaps most significantly, defendant was told that the part of the admonishment related to his right to an attorney did “not necessarily mean that you are involved, but if you were, then that’s what that would apply to, okay?” This could only be interpreted by a minor who was unfamiliar with the rules of *Miranda*, per the court, to mean that he would only need an attorney if he were guilty. This, of course, is also an incorrect statement of the law. As such, by trivializing the significance of his rights, minimizing their significance and his need to invoke them, as well as being misled concerning his right to the assistance of counsel, defendant was not “effectively apprised of his rights.” As such, his waiver was invalid and his resulting confession inadmissible in a court of law. (2) *Voluntariness*: Also, the Court found that the incriminating statements defendant made during the latter part of his 12½ hour interrogation were involuntary. The issue here was whether, considering the totality of the circumstances, defendant’s “will was overborne by the circumstances surrounding the giving of (his) confession.” In other words; “(Was) the confession the product of an essentially free and unconstrained choice by its maker(?)” (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218.) Some of the circumstances to be considered by a court in evaluating this “due process” issue include the length of the interrogation, the use of fear to break a suspect, the youth and/or lack of criminal sophistication of the accused, and the lack of an adequate admonishment as required by *Miranda*. In this case, a 17-year-old minor, who, as an immigrant from another country (i.e., Thailand) with little or no familiarity with the constitutional concepts related to self-incrimination, having been provided with a legally defective and misleading *Miranda* admonishment, and then subjected to a “relentless and uninterrupted” lengthy interrogation by a tag-team of up to four law enforcement officers barraging him with repeated accusatory questions accompanied by demands that he desist in his efforts to remain mute, was in this Court’s opinion, pushing the interrogation-tactic envelope too far. Under these circumstances, per the court, defendant’s will to resist was “overborne.” His eventual confession was not voluntary and should have been suppressed. Finding the error in admitting defendant’s statements against him *not* to be harmless, defendant’s conviction was reversed.

Note: This decision might be subject to some criticism, the Ninth Circuit having overruled a trial judge, an Arizona appellate court, and a federal district court judge, all of whom believed that his *Miranda* admonishment was legally sufficient that that his will

had not been overborne. Three Ninth Circuit justices, as noted in a lengthy dissent in this case, would have upheld the admonishment. And four justices failed to find any due process violation in the interrogation tactics used. But assuming for the sake of argument that the facts haven't been exaggerated here by the Court's majority, this decision shouldn't be a total surprise. First, you should know that this same team of interrogators previously obtained confessions to these same murders from four other suspects, unrelated to defendant and Garcia. That case was dismissed when defendant was charged. So we have to look at what they were doing wrong. It's always dangerous for a police interrogator to unnecessarily elaborate on the admonishment itself. Doing so in this case resulted in the Ninth Circuit properly criticizing the investigators' attempts to minimize the importance of the admonishment. You just can't do that. Also, an officer's attempts to ad-lib when describing a person's right to the assistance of an attorney, making it sound like it's really meant for the protection of the guilty only (which I'm sure the officer in this case didn't really mean to say), is not a good interrogative tactic. Sticking to the language of the admonishment card or preprinted form, very carefully wandering into extraneous explanations only when asked by the suspect, avoids these problems. And lastly, but certainly not least, the tone of an interrogation itself, high-pressuring a suspect into talking when there are strong indications of his reluctance to do so, invites litigation. This case, with judges at various levels themselves differing as to the legality of the techniques used, is illustrative of the fine line between a lawful interrogation and pushing the proverbial envelope too far. Some high pressure and a little bit of yelling is normally okay. (*Colorado v. Connelly* (1986) 479 U.S. 157, 164, fn. 2, & 167.) But combine the tactics as used in this case with the other circumstances of the suspect being a criminally unsophisticated minor, subjected to a half-day interrogation, and the issue is one it shouldn't be a surprise that we lost.

Detentions:

Miranda; Custody and the Public Safety Exception:

Consent to Search:

Curtilage in a Campground:

***United States v. Basher* (9th Cir. Jan. 20, 2011) 629 F.3rd 1161**

Rule: (1) A detention is justified where officers have personal knowledge of defendant's possible illegal use of a firearm and an illegal campfire. (1) *Miranda* is not required in a non-custodial situation. When asking about a firearm, the "public safety exception" excuses the lack of a *Miranda* admonishment even if the situation were custodial. (3) A head-nod in response to a request to retrieve a firearm is an express consent. (4) The area around a tent in a public campground is not the equivalent of the curtilage around a residence, and therefore is not entitled to Fourth Amendment protections.

Facts: On the evening of September 1, 2007, campers on National Forest Service land in Yakima County, Washington, heard intermittent gunfire over a timespan of some two hours. The shots appeared to be coming from a "dispersed" (i.e., nearby, undeveloped) campsite, set away from the regular sites. A campfire could also be seen at the same

location even though a “burn ban” was in effect at the time. The campers making these observations included two off-duty law enforcement officers; Yakima County Deputy Sheriff Dan Cypher and Forest Service Officer Blair Bickel. Both officers independently decided the next day, upon reporting to work, to check the area of the dispersed campsite. Arriving at about the same time, the officers noted a pickup truck, a tent, and a fire ring with rocks piled higher than normal around the edge, ostensibly to make it harder to see a fire. Smoke was still emitting from the fire ring. Deputy Cypher parked his vehicle nose-to-nose with the truck, at least partially blocking it from leaving. On the seat of the truck the officers observed a half-empty open box of shotgun shells. Deputy Cypher emitted a few short bursts from his vehicle’s siren, causing the occupants of the tent to begin to stir. As the officers approached the tent, Deputy Cypher announced; “Sheriff’s Office.” Upon seeing movement inside the tent, the occupants, defendant and his son (age unknown), were “asked” to come out, which they did. As they exited their tent, they were asked to keep their hands in view. But no one was handcuffed or frisked. Deputy Cypher asked defendant where the gun was. Defendant responded; “*What gun?*” After it was explained to him that the officers had seen the shotgun shells in his truck and that there had been reports of gunfire coming from the campsite, defendant admitted that it was in the tent. When Deputy Cypher asked if defendant’s son could retrieve the weapon from the tent, defendant looked at his son and nodded affirmatively for him to get it. The only thing the officers said to defendant’s son was related to how to handle the gun safely. The weapon turned out to be a sawed-off shotgun. Defendant was arrested and given his *Miranda* rights and questioned, making inculpatory admissions. Charged in federal court with being a “prohibited person” in possession of a firearm (18 U.S.C. § 922(g)(1)) and possession of an unregistered firearm (18 U.S.C. § 5861(d)), defendant’s motion to suppress was denied. He pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. (1) *Detention:* Defendant challenged the legality of the initial contact, arguing that it was done without cause (i.e., no more than a “hunch.”) The Court, however, found that Officers Cypher and Bickel had an articulable reasonable suspicion “that criminal activity may be afoot,” justifying a temporary detention for investigation. From their own knowledge, they had reason to believe that illegal shooting and an illegal campfire had occurred at (or at least nearby) the defendant’s campsite, with no guarantee that it wouldn’t continue. Further, asking about the firearm was properly within the scope of the investigation. But even if it wasn’t, asking about the gun was not improper in any case so long as it did not prolong the detention. (2) *Miranda:* Defendant argued that asking him about a gun without benefit of a *Miranda* admonishment was illegal. The Court disagreed. The issue was whether at the time Deputy Cypher asked defendant where the gun was, was defendant in custody for purposes of *Miranda*? Such custody requires that there be a restriction on a person’s freedom to the degree of a formal arrest, or as might be associated with a formal arrest, as perceived by a reasonable person under the circumstances. Briefly sounding a police siren, verbally announcing their presence, and asking the subjects to come out of their tent did not amount to an arrest. Neither did the act of asking defendant and his son to keep their hands in view; an officer safety issue. And although one of the patrol cars was parked directly in front of defendant’s truck, the evidence was that the truck could have still been driven around the officer’s car. Further, even if *Miranda* did apply, the

“public safety exception” allowed for the question concerning the gun. So long as there is an “objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon,” *Miranda* is not required. (3) *Consent*: Defendant further argued that the officers made him produce the gun from his tent, the equivalent of a search without probable cause. The Court disagreed, finding that it was consensual. Assuming for the sake of argument that defendant had a reasonable expectation of privacy in his tent, the Court held that his head-nod to his son, made in response to Deputy Cypher’s request that he allow his son to retrieve the gun from the tent, was an express consent. (4) *Privacy Expectation in a Campsite*: Lastly, defendant argued that he had privacy rights in the campsite around the area of his tent similar to that of the curtilage of one’s home. While recognizing that defendant may have had privacy rights in the interior of his tent itself, there is no authority for extending the curtilage theory to the area around his tent. The area around defendant’s tent was open to the public and exposed to view by anyone passing by. As such, the officers did not violate the Fourth Amendment by entering into his campsite without a search warrant.

Note: The Court made a big deal about having an articulable reasonable belief that defendant had been engaged in illegal activity, justifying a detention. To me, this was a non-issue. But even if they had not, I believe we would still have had a strong argument that the contact really was no more than a “consensual encounter,” for which no reasonable suspicion is needed. The main reason I briefed this case at all was to discuss the privacy rights of a camper in his tent, and the area immediately surrounding it. Citing *United States v. Gooch* (9th Cir. 1993) 6 F.3rd 673, the Court assumed, without discussing, that it would have been a Fourth Amendment violation for the officers to conduct a warrantless search of defendant’s tent. But *Gooch* involved a situation where the defendant took steps to secret his tent in the brush, creating an expectation of privacy for himself. There was no such evidence in this case. California has no contrary authority, although the State of Washington, in *State v. Cleator* (1993) 857 P.2nd 306, 308-309, ruled contrary to *Gooch*, finding no privacy rights in one’s tent. I also found interesting defendant’s attempt to extrapolate a residential curtilage theory to the area around his tent. You have to give him an “A” for effort on that one. And that’s just the kind of weird stuff the Ninth Circuit sometimes goes for, so why not give it a shot. But at least this time, weird didn’t fly.